FILED
OCT 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-89

In the Supreme Court of the United States

TEODORO TOLEDO AND JOSEPH TUCKER,
PETITIONERS

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
WILLIAM KANTER
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the courts below improperly declined to entertain this suit alleging that a federal agency violated the terms of a collective bargaining agreement.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 9
Asociacion de Empleados del Area Canalera v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) 7
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 10
Empire Healthchoice Assurance, Inc. v. *McVeigh*, 126 S. Ct. 2121 (2006) 10
Heydon v. *MediaOne of S.E. Mich., Inc.*, 327 F.3d 466 (6th Cir. 2003) 6
Jackson Transit Authority v. *Local Div. 1285*, 457 U.S. 15 (1982) 10
Karahalios v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989) 11, 12
Mudge v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002) 4, 7
United States v. *Fausto*, 484 U.S. 439 (1988) 9, 11
United States v. *Sherwood*, 312 U.S. 584 (1941) 3
Verizon Md. Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) 9

Case—Continued: Page

Whitman v. *Department of Transp.*:
382 F.3d 938 (9th Cir. 2004), vacated and remanded on other grounds, 126 S. Ct. 2014 (2006) 4, 6, 7
126 S. Ct. 2014 (2006) 4, 6, 8, 9, 10

Statutes:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 8
5 U.S.C. 701(a)(1) 10
5 U.S.C. 702 10
Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.* 3
5 U.S.C. 7111 10
5 U.S.C. 7114 10
5 U.S.C. 7117 10
5 U.S.C. 7121(a)(1) (1988) 7
5 U.S.C. 7121(a)(1) ..... *passim*
5 U.S.C. 7121(b)(1)(C)(iii) 11
5 U.S.C. 7122(a) 11
5 U.S.C. 7123(a) 11, 12
5 U.S.C. 7123(b) 12
28 U.S.C. 1331 ..... 5, 8, 9, 10, 11
28 U.S.C. 1343 ..... 5, 9
28 U.S.C. 2201 ..... 5, 6, 9

In the Supreme Court of the United States

No. 07-89

TEODORO TOLEDO AND JOSEPH TUCKER,
PETITIONERS

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A11) is reported at 485 F.3d 836. The initial memorandum opinion of the district court (Pet. App. A1-A4) and the subsequent opinion and order (Pet. App. A5-A6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2007. The petition for a writ of certiorari was filed on July 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were employees in the Louisville, Kentucky, office of the U.S. Department of Housing and Urban Development (HUD) when they applied for positions within HUD as community builders. Pet. App. A1, A8. When they were not selected, the union representing their bargaining unit, the local of the American Federation of Government Employees (AFGE or union), asked HUD to release the placement records it had considered in filling the positions. *Ibid.* When HUD did not release the records, the union filed an unfair labor practice charge with the Federal Labor Relations Authority (FLRA), which ordered HUD to release the records. *Id.* at A8. HUD provided only some of the relevant documents, explaining that others could not be located. *Ibid.*

Petitioners, represented by AFGE, filed a grievance against HUD pursuant to the union's collective bargaining agreement with HUD.[1] Their grievance alleged "that HUD violated the [collective bargaining agreement] by not producing documentation," and they asked to be "awarded the community builder position or an equivalent position." Pet. 2, 4.

At the first step of the collective bargaining agreement's three-step grievance procedure, the union and HUD negotiated a settlement. Under the terms of the settlement, petitioners were granted "Priority Consideration" for comparable future vacancies. C.A. App. 53. The agreement stated: "[T]his Agreement * * * shall constitute the full and complete resolution of this * * * [g]rievance, and further constitute a waiver of all appeal

---

[1] AFGE also acted on behalf of a third HUD employee, Deborah Knight, who is not a party to this case. Pet. App. A8.

rights respective of this action to any Federal administrative agency or Federal court." *Ibid.*

2. Notwithstanding the settlement, petitioners filed suit against the Secretary of HUD in district court, alleging that HUD had violated "their rights under the Collective Bargaining Agreement." C.A. App. 6 (Compl. para. 7). In their prayer for relief, they sought an injunction preventing further violations of the collective bargaining agreement and awarding them the community-builder positions; a declaratory judgment that their rights had been violated; and "an award of damages for back pay, front pay, lost benefits, and compensatory damages." *Id.* at 7.

3. The district court granted HUD's motion for summary judgment on two separate grounds. In an initial opinion entered on April 21, 2006 (Pet. App. A1-A4), the district court determined (1) that no federal statute authorizes federal-court jurisdiction over employment-related claims covered by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7101 *et seq.*, and (2) that the collective bargaining agreement provides petitioners' "exclusive avenue of remedy" and does not contemplate a suit like this one. Pet. App. A2, A5-A6.[2]

In elaborating on the first ground, the court explained that the United States cannot be sued "[a]bsent an express waiver of sovereign immunity." Pet. App. A2 (citing *United States* v. *Sherwood*, 312 U.S. 584 (1941)). The district court rejected petitioners' argument that 5 U.S.C. 7121(a)(1) provides such a waiver. That paragraph generally provides that "any collective bargaining

---

[2] Because the court determined that it lacked jurisdiction over petitioners' suit, it did not address HUD's additional argument that the suit was barred because the settlement agreement constituted an accord and satisfaction of the dispute. Pet. App. A2.

agreement" between the government and an employees' union "shall provide procedures for the settlement of grievances, including questions of arbitrability," and further specifies that those procedures generally "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." *Ibid.*

In rejecting petitioners' reading of 5 U.S.C. 7121(a)(1) as a waiver of federal sovereign immunity, the district court declined (Pet. App. A3) to adopt the Federal Circuit's conclusion in *Mudge* v. *United States*, 308 F.3d 1220 (2002), that, since Section 7121(a)(1) was amended in 1994, it "no longer restricts a federal employee's right to pursue an employment grievance in court." *Id.* at 1232. Instead, the district court found more convincing (Pet. App. A3) the Ninth Circuit's opinion in *Whitman* v. *Department of Transportation*, 382 F.3d 938 (2004), vacated and remanded on other grounds, 126 S. Ct. 2014 (2006) (per curiam). The district court concluded that Section 7121(a)(1) is "such a limited provision" that it "does not act to expressly confer federal court jurisdiction over claims covered by negotiated grievance procedures." Pet. App. A3. Nevertheless, noting that *Whitman* was pending before this Court, the district court stayed further proceedings, pending a decision from this Court that it expected would "settle[] the circuit conflict" about the preclusive effect of Section 7121(a)(1). *Id.* at A4.

On June 5, 2006, this Court issued a per curiam decision in *Whitman* that vacated the Ninth Circuit's decision and remanded the case for further proceedings, but did not decide whether Section 7121(a)(1) forecloses federal-court jurisdiction over federal personnel matters. See *Whitman* v. *Department of Transp.*, 126 S. Ct. 2014, 2015-2016 (2006). On June 8, 2006, the district

court reaffirmed its prior determinations and issued an order dismissing petitioners' complaint. Pet. App. A5-A6.

4. The court of appeals affirmed. Pet. App. A7-A11. The court held that petitioners failed to establish that the district court had jurisdiction over their claims. *Id.* at A9. The court explained that, while petitioners relied on 28 U.S.C. 1331, that statute confers only general federal-question jurisdiction and does not supply the requisite waiver of sovereign immunity (as petitioners would need to proceed in their suit against the Secretary of HUD in his official capacity). Pet. App. A9.

The court of appeals noted that, even if the collective bargaining agreement could waive a federal agency's immunity, "[n]othing about the agreement" here "purports to empower the *federal courts* to resolve" claims against the agency, since, by its terms, "the grievance procedures established by the agreement 'constitute[] *the sole and exclusive procedure[s]* for the resolution of grievances by employees of the bargaining unit.'" Pet. App. A9-A10 (quoting C.A. App. 54).

The court of appeals also rejected petitioners' reliance on other statutory provisions to establish jurisdiction. With regard to 28 U.S.C. 1343, which grants jurisdiction over civil actions to recover damages or secure equitable relief "under any Act of Congress providing for the protection of civil rights," Pet. App. A10, the court explained that petitioners "filed this lawsuit under 'the labor agreement' * * * not under any statute, much less under a civil rights statute." *Ibid.* (quoting C.A. App. 5). With regard to 28 U.S.C. 2201, the court explained that the Declaratory Judgment Act "is not 'an independent basis for federal subject matter jurisdiction,' and [petitioners] have not identified any other con-

gressional statute that gives the federal courts jurisdiction over this dispute." *Ibid.* (quoting *Heydon* v. *MediaOne of S.E. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003)).

The court of appeals also rejected petitioners' reliance on the Federal Circuit's decision in *Mudge*, *supra*. The court concluded that, even if "for the sake of argument we were to accept *Mudge* as accurately construing the CSRA, that does not solve [petitioners'] problem" for two separate reasons. Pet. App. A11. First, they "still have not identified an applicable waiver of sovereign immunity—by, say, invoking the Administrative Procedure Act." *Ibid.* Second, "they cannot tenably claim that § 7121(a)(1) by itself confers jurisdiction. It is one thing to say that the statute does not restrict an employee's right of action, which is what *Mudge* says; it is quite another to say that the statute creates jurisdiction to hear the right of action, which no case says." *Ibid.* Moreover, the court noted, *Whitman* affirmatively "confirmed" that Section 7121(a)(1) "'does not confer jurisdiction.'" *Ibid.* (quoting *Whitman*, 126 S. Ct. at 2015).

ARGUMENT

Petitioners ask this Court to clarify "confus[ion]" about "the interpretation of 5 U.S.C. 7121(a)(1)." Pet. 8. But the prior circuit conflict about the effect of Section 7121(a)(1) was eliminated when this Court vacated the Ninth Circuit's decision in *Whitman* v. *Department of Transportation*, 382 F.3d 938 (2004), 126 S. Ct. 2014 (2006) (per curiam), and the court of appeals in this case did not take a position on the effect of Section 7121(a)(1). Moreover, even assuming that petitioners' claim arises under federal law and that there is a waiver of federal

sovereign immunity for some part of it, their case was properly dismissed because the CSRA provides no cause of action against federal agencies for violations of collective bargaining agreements. Further review is not warranted.

1. The CSRA provides that "any collective bargaining agreement" between the government and an employees' union "shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Until 1994, Section 7121(a)(1) also provided, with specified exceptions not pertinent here, that those "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988). As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

Following the 1994 amendments, two circuits have held that the addition of the word "administrative" eliminated the provision's earlier preclusive effect. See *Mudge* v. *United States*, 308 F.3d 1220, 1227 (Fed. Cir. 2002); *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Comm'n*, 329 F.3d 1235, 1241 (11th Cir. 2003). The Ninth Circuit held that "because the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction, * * * amended § 7121(a)(1) establishes no more than an exclusive administrative remedy." *Whitman*, 382 F.3d at 943. This Court, however, vacated the Ninth Circuit's decision in *Whitman* on other grounds, without reaching the question of how to

construe Section 7121(a)(1). *Whitman*, 126 S. Ct. at 2015-2016.

The Sixth Circuit below did not weigh in on this issue. It concluded that—even assuming "for the sake of argument" that *Mudge* "accurately" held that the CSRA does not restrict an employee's right of action in federal court—petitioners have failed to identify a statute, like the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that affirmatively waives federal sovereign immunity. Pet. App. A11. As the court of appeals observed, petitioners must do more than identify some general grant of jurisdiction; they must "identify a waiver of sovereign immunity in order to prevail." *Id.* at A9.

Thus, in the wake of *Whitman*, there is no conflict in the circuits over the proper interpretation of Section 7121(a)(1), and petitioners have not identified any decision conflicting with the court of appeals' actual ruling in this case.

2. Petitioners imply that the court of appeals failed to heed this Court's decision in *Whitman*. Pet. 8-9. In *Whitman*, the petitioner claimed that his federal agency employer had subjected him to nonrandom drug tests, in violation of the Constitution and a federal statute dealing with drug testing. 126 S. Ct. at 2015. This Court noted that federal-court jurisdiction existed because Whitman's claims arose "under the Constitution, laws, or treaties of the United States." *Ibid.* (quoting 28 U.S.C. 1331). With that jurisdictional ground established, the Court further stated:

> The question, then, is not whether 5 U.S.C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) *removes* the jurisdiction given to the federal courts, or otherwise precludes employees

> from pursuing remedies beyond those set out in the CSRA.

Ibid. (citations omitted; emphasis added).

Petitioners recount this passage from *Whitman* twice, and argue that it means the district court had jurisdiction over their claims by virtue of Section 1331. Pet. 5-6, 8-9.[3] That argument is unavailing. In *Whitman*, the employee alleged that the agency had violated his constitutional rights and a specific federal statute, 126 S. Ct. at 2015, whereas petitioners have alleged a violation of a collective bargaining agreement—and no more. Moreover, in each of the cases this Court cited in *Whitman*, some federal statute clearly gave rise to the underlying claim.[4] *Whitman*, therefore, does not aid

---

[3] Given petitioners' current focus on Section 1331, they appear not to take issue with the Sixth Circuit's holding that neither 28 U.S.C. 1343 nor 28 U.S.C. 2201 constitutes a waiver of sovereign immunity or grant of jurisdiction in this case. Although petitioners now assert (Pet. 3) that they "brought this lawsuit pursuant to 5 U.S.C. § 7101 et. [*sic*] seq.," the complaint, as the Sixth Circuit discussed (Pet. App. A9), alleged that the district court had jurisdiction under 28 U.S.C. 1331, 1343, and 2201 (C.A. App. 5 (Compl. para. 1)), and never mentioned the CSRA at all. In any event, as this Court recognized in *Whitman*, Section 7121(a)(1) "does not confer jurisdiction." 126 S. Ct. at 2015.

[4] See *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642 (2002) (petitioner alleged that a state commission had violated the Telecommunications Act of 1996, thus giving a district court the authority to "review the Commission's order for compliance with federal law"); *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (plaintiff had sued under the Back Pay Act and the Tucker Act); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 138-139 (1967) (petitioners' APA claim alleged that the agency's regulations exceeded the authority granted by the Federal Food, Drug, and Cosmetic Act).

petitioners in their effort to establish jurisdiction under Section 1331.[5]

In any event, even if petitioners' claims did arise under federal law, they still have failed to identify an express waiver of sovereign immunity. The petitioner in *Whitman* claimed that the APA waived sovereign immunity for his suit. See Pet. Br. at 13, 15, 18, 33, *Whitman* v. *Department of Transp.*, 126 S. Ct. 2014 (2006) (No. 04-1131). Here, by contrast, petitioners do not contest the Sixth Circuit's observation (Pet. App. A11) that they do not invoke the APA. That makes sense, since the APA waives immunity only for suits "seeking relief other than money damages." 5 U.S.C. 702. Petitioners' claims for "back pay, front pay, lost benefits, and compensatory damages" (C.A. App. 7) seek substitute or compensatory relief and thus fall outside the scope of the APA's waiver. See *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262-263 (1999).

Moreover, to the extent that petitioners also seek injunctive relief that could fall within the APA's waiver, they still have no cause of action in district court. The APA is inapplicable when another statute implicitly or explicitly "preclude[s] judicial review." 5 U.S.C. 701(a)(1). Here, the CSRA establishes a comprehensive

---

[5] Petitioners do not argue that their claim arises under federal law because they have sued a federal agency for violation of an agreement that was entered into under federal law. See, *e.g.*, 5 U.S.C. 7111, 7114, 7117 (providing for collective bargaining agreements between federal agencies and recognized unions); cf. *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 126 S. Ct. 2121, 2135 (2006) (noting prior decisions "demonstrat[ing] that . . . private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes") (quoting *Jackson Transit Auth.* v. *Local Div. 1285*, 457 U.S. 15, 22 (1982)). This case therefore presents no occasion to consider that question.

remedial scheme that demonstrates Congress's intent to limit federal employees to the remedies explicitly provided by statute, which do not include district court review in cases like this.

The CSRA provides for a negotiated-grievance procedure that may be subject to binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), for review of arbitral awards by the FLRA, 5 U.S.C. 7122(a), and for limited judicial review *in the courts of appeals*, 5 U.S.C. 7123(a). In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," *id.* at 445, "the absence of provision for [federal] employees to obtain judicial review" manifested "a considered congressional judgment that they should not have statutory entitlement to review for adverse action [taken against them for misconduct]." *Id.* at 448-449. Similarly, in *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court declined to infer a right of action in district court against a union, explaining that such a proceeding "would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to the [FLRA's] General Counsel and the FLRA and to *confine the courts to the role given them under the Act*." *Id.* at 536-537 (emphasis added).

In this case, the cause of action that petitioners infer from Section 7121(a)(1)'s reference to "exclusive administrative procedures" cannot be reconciled with the framework provided by *Fausto*, which analyzed "the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes." 484 U.S. at 444. Thus, even if the court of appeals erred in finding that there is no jurisdiction under Section 1331 and that

there is no express waiver of federal sovereign immunity, it was still correct in affirming the dismissal of petitioners' complaint.

3. Petitioners devote more than two pages (Pet. 6-8) to arguing that, on the facts of this case, the settlement agreement between the union and HUD did not constitute an accord and satisfaction of their claims—an issue that was reached by neither court below. That fact-bound contention does not implicate any conflict and does not warrant this Court's review.

Moreover, petitioners' suggestion that the rejection of their claim leaves them without a remedy is not true. If petitioners were dissatisfied with the settlement agreement negotiated by their union representative—who represented them at their election[6]—they could have filed an unfair labor practice complaint with the FLRA, alleging that the union had breached its duty of fair representation. See *Karahalios*, 489 U.S. at 532, 534. An FLRA decision concerning such a claim would have been subject to review and enforcement in the court of appeals. 5 U.S.C. 7123(a) and (b).

---

[6] Under the collective bargaining agreement, petitioners were entitled to represent themselves in pressing their grievance, or to request representation by the union (though only the union could ultimately have invoked arbitration). C.A. App. 58.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

WILLIAM KANTER
JEFFRICA JENKINS LEE
Attorneys

OCTOBER 2007